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SERVICE DATE - AUGUST 12, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42084

CF INDUSTRIES, INC. v. KANEB PIPE LINE PARTNERS, L.P.
and KANEB PIPE LINE OPERATING PARTNERSHIP, L.P.

Decided: August 11, 2004

In a complaint filed August 1, 2003, CF Industries, Inc. (CFI)[1] asks that we direct Kaneb Pipe Line Partners, L.P. and Kaneb Pipe Line Operating Partnership, L.P. (collectively, Kaneb) to stop charging rates for the pipeline transportation of anhydrous ammonia in excess of those previously prescribed by the Board in CF Industries Inc. v. Koch Pipeline Company, L.P., STB Docket No. 41685 (STB served May 9, 2000) (Koch), aff'd sub nom. CF Industries, Inc. v. STB, 255 F.3d 816 (D.C. Cir. 2001),[2] and that we award reparations for the excess amounts CFI has already paid. Kaneb replied, asking that we dismiss the complaint or, in the alternative, vacate the maximum reasonable rate prescription. This decision orders the rates charged to CFI to be reduced to the levels prescribed in Koch, awards reparations, and asks for more information to determine whether to vacate the prescription for future transportation.

BACKGROUND

In 1996, CFI filed a complaint arguing that rate increases imposed by the owner of the pipeline at that time, Koch Pipeline Company, L.P. (Koch), were unreasonable under 49 U.S.C. 15501(a) and discriminatory under 49 U.S.C. 15505. CFI used the revenue adequacy constraint of the Constrained Market Pricing (CMP) principles articulated in Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985) (Rate Guidelines), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987), to make its case. Under the revenue adequacy constraint, a challenged rate increase may be found unlawful if the carrier is already earning adequate revenues. Adequate revenues are those which cover all costs and provide a rate of return on investment equal to the current cost of capital (i.e., the level of return available on

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[1] CFI, a cooperative owned by eight regional farm cooperatives, manufactures anhydrous ammonia at a complex in Louisiana and distributes it to five Corn Belt states through the pipeline at issue here.

[2] The pipeline at issue runs from ammonia production facilities in southern Louisiana north to Hermann, MO, where it splits into an eastern and a western leg. The eastern leg serves terminals in Illinois and Indiana. The western leg serves terminals in Missouri, Iowa and Nebraska.

alternative investments), so that the carrier can compete equally with other firms for available financing in order to maintain, replace and, if necessary, expand its facilities and service. Rate Guidelines, 1 I.C.C.2d at 535, citing Standards for Railroad Revenue Adequacy, 364 I.C.C. 803 (1981), aff'd sub nom. Bessemer & Lake Erie R.R. v. United States, 691 F.2d 1104 (3d Cir. 1982), cert. denied, 462 U.S. 1110 (1983). In Koch, the Board found that Koch was earning adequate revenues without the challenged rate increases and that the rate increases were thus unreasonable. Accordingly, the Board awarded reparations for past pipeline movements made under the challenged rates, and prescribed maximum reasonable rates for future movements at the pre-increase levels.

In the Fall of 2002, Kaneb purchased the pipeline from Koch for approximately $140 million. On April 1, 2003, the new carrier increased the rates charged to CFI above the maximum rate levels prescribed by the Board in Koch.

CFI filed the instant complaint claiming that Kaneb was barred by the Board's rate prescription from unilaterally increasing the rates charged to CFI above the prescribed level.[3] Kaneb replied, asking that we dismiss CFI's complaint or, in the alternative, vacate the rate prescription established in Koch. CFI responded with a counter-motion seeking summary judgment to enforce the Koch prescription. Kaneb filed a reply to the counter-motion, again requesting, among other things, that the Koch prescription be lifted.

DISCUSSION AND CONCLUSIONS

Kaneb's attempt to raise its rates despite the Koch prescription is contrary to 49 U.S.C. 15503. That provision reads, in pertinent part: "When a rate, classification, rule, or practice is prescribed under this subsection, the affected carrier may not publish, charge, or collect a different rate. . . ." When Kaneb purchased the pipeline, it stepped into Koch's shoes as the carrier providing the transportation at issue and became the regulated entity subject to the same regulatory requirements that applied to Koch. These requirements included the outstanding rate prescription for providing pipeline transportation to CFI, and thus Kaneb, just like Koch, could not lawfully raise the rate charged to CFI without first getting the prescription removed.

Kaneb's argument that it was free to raise the prescribed rate because the prescription no longer has any force due to intervening events is contrary to the Supreme Court's decision in Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry., 284 U.S. 370 (1932) (Arizona Grocery), which construed a statutory provision similar to section 15503. That case arose when the Board's predecessor, the Interstate Commerce Commission (ICC), sought to award

[3] Another pipeline customer, Dyno Nobel Inc., also challenged Kaneb's rate increases, albeit on somewhat different grounds, in a complaint filed on June 16, 2003, in STB Docket No. 42081, Dyno Nobel Inc. v. Kaneb Pipe Line Partners, LP.

reparations with respect to past shipments that had moved under a rail rate prescription that the ICC later determined to be erroneous. The Court reasoned that the ICC's rate prescription was an action that was legislative in nature and thus had the force of a statute in establishing the maximum lawful rate. 284 U.S. at 386-87. Thus, the ICC was bound to recognize the validity of the rule of conduct it had approved and could not, when later acting in its quasi-judicial capacity in reviewing the rate, retroactively repeal its own enactment. Id. at 389.

Kaneb argues that, while Arizona Grocery constrains the Board from retroactively changing a prescription, it does not prohibit a carrier from disregarding a rate prescription if the carrier concludes that there has been a material change of circumstances. But Arizona Grocery is not so limited; because the rate prescription has the force of a statute, the carrier is bound by and cannot unilaterally charge more than the prescribed rate absent Board removal of the prescription. Kaneb's construction would produce the perverse result that a carrier would have more power to "repeal" a rate prescription than the agency that prescribed the rate. This conclusion is inconsistent with the rationale of Arizona Grocery and must be rejected.

Because the rate prescription survives until it is vacated, we must next address Kaneb's contention that the prescription should now be vacated in light of changed circumstances. In determining whether to vacate a prescription, and thus to restore ratemaking initiative to the carrier, we must assess whether the factual and legal bases of the prescription remain valid. See San Antonio, TX v. Burlington Northern, Inc., 364 I.C.C. 887, 896 (1981); Arizona Public Service Co. v. Burlington N. & Santa Fe Ry., STB Docket No. 41185 (STB served May 12, 2003). Although Kaneb has presented some information indicating that circumstances have changed, we cannot determine based on the record before us whether the bases for the original prescription remain valid.

As noted, the rate reasonableness determination in Koch applied the revenue adequacy constraint, under which a rate increase is unreasonable if the carrier proposing it is already earning sufficient revenues from its existing rate structure to cover its costs and provide a sufficient return on investment. This constraint, then, is based on the financial profitability of the pipeline. In Koch, the Board compared the revenue stream produced by this particular pipeline to the capital investment and operating costs incurred by the carrier (at that time Koch) in providing pipeline service.

While there is no claim here that Kaneb's costs of operating this pipeline are significantly different from those that were incurred by Koch, its capital investment in the pipeline may be different. Koch had acquired the pipeline for $77.2 million in 1988 and had not invested substantial additional funds in the pipeline as of the time of the Board's prescriptive decision. Koch at 23-24. The Board expressly noted, however, that, if Koch were to invest significant additional sums in the pipeline as planned (to replace, modernize, and maintain the pipeline), such investment could justify additional revenues, and the agency stood ready to alter or lift the prescription in that event. Id. at 26. Kaneb purchased the business for approximately $140 million. However, Kaneb does not indicate what assets were encompassed in that purchase price and how much of the purchase price is attributable to the pipeline itself. Thus, we cannot determine on the current record whether or how the $140 million purchase price may affect the factual underpinnings of the Koch prescription. Furthermore, Kaneb has provided no information about its relationship, if any, with Koch.

Without this information, we cannot determine whether we can or should alter or lift the Koch prescription. Consequently, Kaneb should submit to the Board a verified statement to support its claim of materially changed circumstances. Its submission should include, but need not be limited to: a list of the assets Kaneb purchased from Koch and an itemized valuation of those assets; a comparison to the assets that the Board examined in Koch; the complete Koch/Kaneb asset purchase and sale agreement; a statement setting forth facts sufficient to establish whether or not this was an arm's length transaction; and any other information relevant to its claim of materially changed circumstances. Kaneb's evidence should be submitted by September 13, 2004. CFI's reply is due on September 27, 2004 and Kaneb's rebuttal on October 4, 2004.

Once the record is complete, we will rule on whether Kaneb has demonstrated changed circumstances sufficient to warrant vacating the prescription. In the meantime, because the prescription remains in effect until such time as it is vacated, Kaneb must lower the rates charged to CFI to the levels prescribed in Koch, and it must pay reparations to CFI for all amounts collected in excess of the prescribed rate levels.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Kaneb shall not charge CFI rates in excess of the rate levels prescribed in Koch, and Kaneb shall pay CFI reparations with interest, calculated in accordance with 49 CFR 1141, for overcharges the carrier collected between April 1, 2003, and the effective date of this decision.

2. The parties shall submit further evidence and argument in accordance with the procedural schedule set forth above.

3. This decision is effective August 27, 2004.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams
Secretary